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498-650—73——1

## QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that, prior to the effective date of Title VII of the Civil Rights Act of 1964, the Chesapeake & Ohio Railway Company had hired and assigned employees on the basis of their race into segregated units of the brakeman and the clerical crafts.

2. Whether the court of appeals correctly held (a) that the company's present seniority systems perpetuate the effects of its past discriminatory hiring and assignment practices by preventing qualified black employees from competing on an equal seniority basis with their white contemporaries for the jobs previously closed to them, and (b) that such seniority systems are neither bona fide nor required by business necessity.

3. Whether the relief in this case should include providing to blacks against whom the company had discriminated the right to use company seniority in bidding for future vacancies in the department from which they had been discriminatorily excluded.

## STATUTE INVOLVED

The relevant provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, are set forth at pages 3–6 of the petition.

## STATEMENT

This action was filed by the United States pursuant to Section 707 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e–6, against the Cheaspeake & Ohio Railway Company (C&O), Locals 268 and 1130

of the Brotherhood of Railroad Trainmen (BRT),[1] and Locals 362 and 1796 of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC).

The complaint alleged that the C&O had discriminated against blacks in hiring, assignment, and promotions in the crafts represented by the BRT locals and the BRAC locals at its Newport News, Virginia, terminal; that BRT and BRAC had entered into collective bargaining agreements with the C&O which tended to perpetuate the effects of the discriminatory practices of C&O; and that BRT and BRAC maintained racially segregated locals at the terminal.[2] The government asked for an injunction barring future discrimination and correcting the continuing effects of past discrimination.

1. The uncontradicted evidence at trial showed that in the brakeman craft between 1918 and 1970,[3] only whites were hired as general yard brakemen, the entry-level job in the classification and switching yard, while only blacks were hired as Barney yard brakemen, the entry level job in the terminal's coal dumping yard. Similarly in the clerical craft, with the

[1] After the commencement of this litigation, the United Transportation Union succeeded the Brotherhood of Railroad Trainmen, and the locals here involved were renumbered 1307 and 1917. For purposes of this litigation the former names and numbers have continued to be used for identity.

[2] The district court ordered merger of the segregated locals, an order from which no party appealed.

[3] The last hiring of brakemen prior to 1970 was in 1957. When hiring resumed in 1970, after this action was filed, it was without regard to race.

exception of four whites hired in the 1940's and promoted soon after, only blacks were hired as group 3 merchandise pier laborers, while only whites were hired as group 2 messengers and group 1 clerks (Pet. App. A 57, A 59, A 68–A 69).

It was further uncontradicted that this racially segregated pattern of assignment was assured during this half-century period by the practice of hiring friends and relatives of incumbent employees to fill vacancies within a department or job classification, and that the C&O cooperated in and fostered this practice (Pet. App. A 60). The evidence also showed that the seniority systems in effect under the collective bargaining agreements between the C&O, the BRT locals, and the BRAC locals prevented or discouraged transfer from traditionally black jobs to the traditionally white, preferred jobs, which provided more regular work and therefore better pay. These seniority systems also denied to blacks competing for traditionally white jobs seniority credit for time spent in traditionally black jobs.

Notwithstanding this showing, the district court held that C&O had not discriminated in its hiring and assignments and that the seniority systems were bona fide systems protected under Section 703(h) of Title VII (Pet. pp. A 14, A 16, A 18–A 19).[4] The court nev-

[4] The district court found that the company did discriminate by providing greater promotion opportunities to general yard brakemen than to Barney yard brakemen, and by giving preference to group 1 and 2 clerical employees over group 3 laborers in bidding on group 1 and 2 jobs (Pet. App. A 16–A 17, A 19).

ertheless granted partial relief "to eliminate certain abrasive features" of the seniority systems (Pet. App. A 19). In the brakeman craft it directed a "top and bottom" merger of the formerly separate general yard and Barney yard seniority rosters, so as to place all Barney yard brakemen at the bottom of the general yard roster and all general yard brakemen at the bottom of the Barney yard roster. That merger would give black brakemen no credit for Barney yard seniority when competing for general yard work. (Pet. App. A 29–A 30, A 48–A 51.) In the clerical craft, the district court ordered that black group 3 men must be permitted to use their terminal seniority in competing for group 1 and 2 jobs; but the court's order denied to transferring group 3 men the right to carry their accumulated seniority with them for purposes of future promotions or job retention (Pet. App. A 32–A 35).

2. The government appealed from the failure of the district court to grant broader seniority relief, and the court of appeals reversed, holding: (1) that the C&O's practices of segregated hiring and assignment in the brakeman and clerical crafts had been discriminatory (Pet. App. A 60, A 68); (2) that the effects of this past discrimination were carried forward by seniority systems which prevented transfers by brakemen between the Barney yard and the general yard and which denied blacks in both the brakeman and clerical crafts the right to exercise their accumulated company seniority in competing for work in traditionally white jobs within those crafts (Pet. App. A 61–A 62, A 68–

A 69); and (3) that the C&O and the unions had failed to show that these discriminatory seniority systems were either bona fide or required by business necessity (Pet. App. A 62, A 64).

The court of appeals set forth guidelines for the decree to be fashioned by the district court on remand. With regard to the brakeman craft, the court of appeals vacated that part of the district court's order limiting seniority relief to a "top and bottom" merger of rosters. It directed that black Barney yard brakemen hired during the period when C&O followed the practice of hiring and assignment by race be permitted to bid on vacancies in the general yard, including vacancies for which the collective bargaining agreement would otherwise provide a preference to younger men returning from layoff or furlough, and that those transferring to the general yard be given full company seniority credit for all purposes (Pet. App. A 65). It also directed that conductor jobs should be awarded on the basis of company seniority whenever black Barney yard brakemen are competing, but on the basis of the existing conductors' seniority roster whenever only general yard brakemen are competing (Pet. App. A 68). In directing these transfer and seniority reforms concerning brakemen, the court of appeals made clear that the reforms were not meant to preclude BRT and the C&O from negotiating broader mergers of the rosters to give general yard brakemen equal standing in the Barney yard, "provided that the company seniority of the Barney yard

brakemen hired before the Act is fully recognized" (Pet. App. A 65–A 68).

In the clerical craft, BRAC and the C&O had entered into an agreement while the case was pending on appeal which, for reasons unrelated to remedying the effects of past discrimination, merged the seniority rosters of all three clerical groups so that group 3 men obtained full use of their accumulated seniority for all purposes in bidding on and retaining work in group 1 and 2 jobs (Pet. App. A 70). The court of appeals directed the entry of an injunction paralleling the terms of this accomplished merger to bar reestablishment of the previous pattern of segregated rosters (Pet. App. A 71).

Finally, the court of appeals required that black Barney yard brakemen and group 3 employees be allowed to bid on vacancies across craft lines between the brakeman and clerical crafts with carry-over seniority (Pet. App. A 77).

## ARGUMENT

The court of appeals held that transfer and seniority rules which deny blacks the opportunity to compete on an equal seniority footing with their white contemporaries for the generally better-paying, traditionally white jobs, from which they were formerly excluded on the basis of their race, perpetuate the effects of that past discriminatory exclusion and constitute present violations of Title VII. This holding is correct and is consistent with all the previous ap-

pellate decisions on the question,[5] including two involving the railroad industry.[6] It is also in accord with *Griggs* v. *Duke Power Co.*, 401 U.S. 424, in which this Court held that Title VII prohibits, not only overt discrimination, but also employment practices which are neutral on their face and even in their motive but which have an unwarranted, disproportionate impact on blacks or other minorities. Review by this Court, therefore, is not warranted.

1. Petitioners characterize the court of appeals' finding of discrimination in initial job assignments as "based upon statistics not found to be rebutted" (Pet. 15), and they contend that such evidence should be held insufficient to establish a pattern or practice of discrimination under Title VII. These statistics showed, however, that prior to the institution of this

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[5] *United States* v. *Bethlehem Steel Corp.*, 446 F. 2d 652 (C.A. 2); *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791 (C.A. 4); *Local 189, United Papermakers* v. *United States*, 416 F. 2d 980 (C.A. 5), certiorari denied, 397 U.S. 919; *Griggs* v. *Duke Power Co.*, 420 F. 2d 1225 (C.A. 4), reversed on another issue, 401 U.S. 424; *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711 (C.A. 7) (sex discrimination).

Closely analogous decisions have held that union referral systems which perpetuate past discrimination violate Title VII: *United States* v. *Sheet Metal Workers, Local 36*, 416 F. 2d 123 (C.A. 8); *Local 53, Asbestos Workers* v. *Vogler*, 407 F. 2d 1047 (C.A. 5); *United States* v. *Electrical Workers, Local 38*, 428 F. 2d 144 (C.A. 6), certiorari denied, 400 U.S. 943; *United States* v. *Ironworkers Local 86*, 443 F. 2d 544 (C.A. 9), certiorari denied, 404 U.S. 984.

[6] *United States* v. *Jacksonville Terminal Co.*, 451 F. 2d 418 (C.A. 5), certiorari denied, 406 U.S. 906; *United States* v. *St. Louis-San Francisco Railway Co.*, 464 F. 2d 301 (C.A. 8), certiorari denied, January 8, 1973, Nos. 72-393 and 72-715.

suit all blacks hired into the brakeman craft were assigned to the Barney yard while all whites were assigned to the general yard where average earnings were higher and where there were greater promotional opportunities. Similarly, all blacks hired into the clerical craft were assigned to group 3 laboring jobs while all but four whites were initially assigned to higher-paying, more desirable group 1 and 2 jobs. The courts of appeals have uniformly held that in Title VII litigation a statistical showing such as this establishes a *prima facie* case of discrimination. See *United States* v. *Hayes International Corp.*, 456 F. 2d 112, 120 (C.A. 5); *United States* v. *Ironworkers Local 86*, 443 F. 2d 544, 551 (C.A. 9), certiorari denied, 404 U.S. 984; *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F. 2d 245 (C.A. 10), certiorari denied, 401 U.S. 954; *Bing* v. *Roadway Express, Inc.*, 444 F. 2d 687 (CA. 5); *United States* v. *Bethlehem Steel Corp., supra.*

Where, as here, such a statistical showing is unrebutted, a finding based on those statistics is warranted. Moreover, in this case there was undisputed evidence of discrimination in addition to the statistical evidence. A 1918 agreement establishing separate seniority for brakemen in the two yards was treated by the C&O and its employees as a segregation agreement (Pet. App. A 57). In addition, the terminal-wide practices of decentralized hiring and of relying upon incumbent employees to recruit friends and relatives to fill vacancies within their individual occupational units perpetuated the racial divisions within the terminal (Pet. App. A 59–A

60). This evidence, together with a uniform pattern of racial hiring appearing in the statistics, clearly justifies a finding of discrimination. *United States* v. *Jacksonville Terminal Co.*, 451 F. 2d 418 (C.A. 5), certiorari denied, 406 U.S. 906.

2. Having determined that the seniority systems in use at the terminal perpetuate the effects of past discriminatory hiring and assignment practices, the court of appeals correctly held they are unlawful under Title VII (Pet. App. A 61–A 62). A bona fide seniority system within the meaning of Section 703(h) of the Act, 42 U.S.C. 2000e–2(h), must be more than facially neutral. An apparently neutral seniority system which tends to lock blacks into the lower-paying, traditionally black jobs to which they were assigned on the basis of their race, perpetuates the effects of past discrimination, and is unlawful under Title VII. The court's holding here does not give retrospective effect to Title VII, as petitioners contend (Pet. 16). It is the present unlawful perpetuation of the effects of pre-Act racial discrimination, not the pre-Act discrimination itself, to which the court's relief is directed. See *Local 189, United Papermakers* v. *United States*, *supra*; *United States* v. *Bethlehem Steel Corp.*, *supra*; *Robinson* v. *Lorillard Corp.*, *supra*; *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp 505 (E.D. Va.).

The court of appeals was also correct in holding that the C&O and the unions had failed to show that business necessity precludes changing the seniority systems to eliminate their discriminatory features. It is not enough to demonstrate that the seniority systems

contribute to safety and efficiency; it must be shown that they are essential to achieving these objectives and that there is no acceptable alternative system with a less severe racial impact. *United States* v. *Bethlehem Steel Corp., supra,* at 662; *Robinson* v. *Lorillard Corp., supra,* at 798; *Local 189, United Papermakers* v. *United States, supra,* at 989.

As the court below properly ruled (Pet. App. A 63), there was no showing that black brakemen are incapable of working in the general yard. Some Barney yard brakemen had worked there satisfactorily on an emergency basis in the past, and the "brakeman's job in the general yard is an entry level position, which the employee learns as he works" (Pet. App. A 63). Likewise, a former Barney yard brakeman who subsequently is promoted from the general yard to the conductor's roster would have at least 14 years' experience as a brakeman, and there is "no proof in the record that a Barney yard brakeman with at least this much seniority who has passed the C&O conductor's examination and undergone the 80 hours training required by the district court is not as well qualified as a white brakeman with less company seniority" (Pet. App. A 66–A 67). Safety and efficiency are not compromised by the court's rulings; it emphasized that "the Act does not require the company to employ or transfer a person who is not capable of doing the job for which he applies" (Pet. App. A 76).

3. The court of appeals' ruling that blacks who were discriminatorily assigned to the Barney yard

may use their company seniority to bid on vacancies in the general yard, including vacancies which would otherwise be filled on a preferential basis by men on lay-off or furlough from the general yard, is consistent with the holdings of the other courts of appeals that have considered the impact of recall provisions in perpetuating the effects of past discrimination. See *United States* v. *Hayes International Corp., supra; United States* v. *Jacksonville Terminal, supra; Williamson* v. *Bethlehem Steel Corp.*, 468 F. 2d 1201 (C.A. 2), petition for certiorari pending, No. 72–1004. While facially neutral, the recall provision in this case has the effect of presently penalizing the black brakeman seeking entry into the general yard by nullifying his Barney yard seniority and according a preference to general yard seniority which, because of his previous discriminatory exclusion from that yard, he was denied the opportunity to acquire.

Petitioners misread the court of appeals' opinion when they contend (Pet. 13–15) that it requires the permanent displacement of junior brakemen on lay-off from the general yard. The court clearly stated that the C&O and BRT were free to "agree to a broader merger of the seniority rosters or to eradicate other distinctions between the yards, provided that the company seniority of the Barney yard brakeman hired before the Act is fully recognized" (Pet. App. A 65).

Thus, the court merely prescribed the minimum rights which must be afforded to black victims of past discrimination; it did not rule that a reciprocal adjustment of the rights of white employees should not be made, but simply that this was a matter more suited to collective bargaining than to disposition by court decree under Title VII. Reserving this matter to the collective bargaining process was not an abuse of discretion and did not render the holding inconsistent with other courts of appeals decisions in Title VII cases. *Local 189, United Papermakers* v. *United States, supra; United States* v. *Bethlehem Steel Corp., supra.*

4. Petitioners also contend (Pet. 17) that permitting blacks to use their company seniority in obtaining jobs as yard conductors constitutes a grant of "superseniority." The court's decision does not have that effect, however; instead it assures that all employees who are qualified to work as conductors compete for conductor positions based on the same measure of seniority (Pet. App. A 68). This rule is also made applicable to competition for general yard braking positions. Similar requirements have been adopted by other courts of appeals in analogous circumstances. *Local 189, United Papermakers* v. *United States, supra; United States* v. *Bethlehem Steel Corp., et al., supra; Robinson* v. *Lorillard Co., supra;* see, also, *Bailey* v. *American Tobacco Company,* 462 F. 2d 160 (C.A. 6).

## CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

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